UNITED STATES TAX COURT
WASHINGTON, DC 20217

WILEY RANDOLPH KUYRKENDALL,	)	**PA**
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 1832-12.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

ORDER AND DECISION

This case is before the Court on respondent's motion for summary judgment pursuant to Rule 121,[1] filed March 4, 2013. On April 4, 2013, petitioner filed his opposition to respondent's motion for summary judgment.

Procedural History

On October 18, 2011, respondent issued to petitioner a notice of deficiency for his 2003, 2004, and 2005 tax years. Petitioner timely filed a petition raising frivolous arguments. On March 14, 2012, respondent filed an answer that included detailed affirmative allegations.

On June 14, 2012, respondent filed a motion for entry of an order that the affirmative allegations in the answer be deemed admitted pursuant to Rule 37(c). On June 15, 2012, this Court served on petitioner a notice of filing of respondent's motion for order under Rule 37, notifying petitioner of respondent's motion and indicating that if he filed a reply on or before July 5, 2012, we would deny respondent's motion, but if he did not file a reply, we would grant respondent's motion and deem admitted the affirmative allegations in the answer. Petitioner failed to file a reply to respondent's motion, and respondent's motion was granted

[1] All Rule references are to the Tax Court Rules of Practice and Procedure, and all section references are to the Internal Revenue Code in effect for the year at issue. All monetary amounts have been rounded to the nearest dollar.

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on August 16, 2012. Consequently, all of the affirmative allegations in the answer are deemed admitted pursuant to Rule 37(c).

Background

The following factual background is derived from respondent's deemed-admitted affirmative allegations, the petition, respondent's motion for summary judgment and the exhibits attached thereto, and petitioner's opposition to respondent's motion for summary judgment.

Since the late 1970s petitioner has operated an independent State Farm Insurance Agency in Jackson, Mississippi. This agency has consistently generated substantial gross receipts greater than amounts requiring the filing of Federal income tax returns.

Before 1996 petitioner had a history of filing Federal income tax returns, but between 1996 and 2008 he filed returns only for his 1998, 1999, and 2000 tax years. For his 2001 through 2003 and 2005 Federal income tax returns, petitioner filed Forms 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, but never filed his 2003, 2004, and 2005 Federal income tax returns. As reflected by these actions, petitioner was well aware of his obligation to file a Federal income tax return for each relevant tax year.

On August 12, 1999, petitioner was indicted on three counts of failing to comply with his State of Mississippi income tax obligations for his 1996 through 1998 tax years. On June 2, 2000, petitioner pleaded guilty to failing to comply with his State of Mississippi income tax obligations.

Although petitioner continued to comply with his Mississippi income tax filing obligations from the June 2, 2000, date of his guilty plea until 2008, petitioner has not filed any Federal income tax returns since his August 2002 filing of his 1998 tax return.

As early as August 2003 respondent began collection actions against petitioner with respect to his assessed and unpaid 1997 and 1998 Federal income tax liabilities. During 2005 petitioner was the subject of a Federal criminal tax investigation in connection with which he was contacted a number of times by investigating Internal Revenue Service (IRS) agents. Also in 2005 petitioner brought suit in the Federal District Court for the Middle District of Mississippi against respondent and his agents, requesting a broad range of relief including the

"removal of all liens and levies" based upon challenges to the Federal taxing system that have long been recognized as having no legal merit.[2] The District Court dismissed that case for failure to state a claim.

From 2005 through 2007 petitioner took a number of actions to transfer, through non arms-length conveyances, real estate held in his name to third party entities that he controlled.

During the years relevant to this case, petitioner was associated with a number of individuals and organizations that challenged the legitimacy of the Federal income tax system under theories the courts have repeatedly determined to have no merit. During the years relevant to this case, petitioner has repeatedly advocated long-discredited legal positions and theories in various letters, filings, and affidavits that he sent to respondent.

For each of the relevant tax years, petitioner received Forms 1099 from the State Farm Insurance Company indicating the substantial amounts of gross receipts he received from such entity during the relevant tax years.

On August 20, 2009, after a jury trial petitioner was found guilty under Title 26, U.S.C. section 7203 criminal failure to file tax returns for each of his taxable years 2002 through 2005, for which he was ultimately sentenced to serve 40 months of incarceration. See United States v. Kuyrkendall, 2009 WL 3230864 (S.D. Miss. 2009); United States v. Kuyrkendall, 2009 WL 2449015 (S.D. Miss. 2009). We take judicial notice that petitioner raises in the instant proceedings many of the same frivolous arguments that he unsuccessfully raised in these criminal proceedings.

Pursuant to section 6020(b) respondent prepared substitutes for return for petitioner's 2003, 2004, and 2005 tax years on the basis of information received from State Farm Fire and Casualty Co., State Farm Life Insurance Co., State Farm Mutual Auto Insurance Co., State Farm General Insurance Co., Insurance Placement Services, Inc., and State Farm Financial Services FSB.

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[2]We take judicial notice that in these District court proceedings petitioner unsuccessfully raised many of the same frivolous arguments that he has sought to raise in the instant proceedings.

On October 18, 2011, respondent issued to petitioner a notice of deficiency for his 2003, 2004, and 2005 tax years. In the notice of deficiency respondent determined, among other things, that petitioner had failed to report $354,389, $351,679, and $367,930 of gross receipts or sales for his 2003, 2004, and 2005 tax years, respectively. Respondent's notice of deficiency determined the following deficiencies in, and additions to, petitioner's Federal income tax liabilities:

		Penalties/Additions to Tax		
Year	Deficiency	Sec. 6651(f)	Sec. 6651(a)(2)	Sec. 6654
2003	$127,049	$92,107	$31,761	$3,278
2004	125,512	90,995	31,378	3,597
2005	131,444	95,297	32,861	5,272

On January 20, 2012, petitioner filed his petition with this Court. In pages attached to his petition he assigned as error that respondent's notice of deficiency labeling him a "taxpayer" was "untrue"; that respondent "erred by claiming there is a Notice of Deficiency that will progress towards Assessment when the IRS has not promulgated substantive regulations for the Part 1 Individual Income Tax mandated by * * * [section 6203]--Method of Assessment"; that respondent "has not promulgated the regulations under the mandatory statutory authority of Congress of * * * [section 6011], being preclusive of filing any Form 1040 with OMB 1545-0074 by the Petitioner"; that the "IRS has misidentified the Petitioner as an employee included in 26 U.S.C. § 6331(a) definitions"; that the "IRS has misidentified the Petitioner as having an employer, *i.e. person* as found in 26 U.S.C. § 3401(d)"; that the "IRS has misidentified the Petitioner as clothed with the definition of 'wages' in 3401(a) as used in this chapter for the 'employer' of 3401(d) as used in this chapter"; and that the "IRS has a duty to follow the mandates of Congress in 26 U.S.C. § 3402(a)(2) and promulgate the regulations for 'withholding'".

On March 4, 2013, respondent filed his motion for summary judgment. On April 4, 2013, petitioner filed his opposition to respondent's motion for summary judgment, advancing frivolous arguments similar to those raised in his petition.

Analysis

Summary judgment is intended to expedite litigation and avoid unnecessary and expensive trials. Fla. Peach Corp. v. Commissioner, 90 T.C. 678, 681 (1988).

Summary judgment may be granted where there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(b). The moving party bears the burden of proving that there is no genuine dispute as to any material fact, and factual inferences will be read in a manner most favorable to the party opposing summary judgment. Sundstrand Corp. v. Commissioner, 98 T.C. 518, 520 (1992), aff'd, 17 F.3d 965 (7th Cir. 1994). When a motion for summary judgment is made and properly supported, the adverse party may not rest upon mere allegations or denials of the pleadings but must set forth specific facts showing that there is a genuine dispute for trial. Rule 121(d).

In his opposition to respondent's motion for summary judgment, petitioner argues generally that he is not subject to Federal income tax because no statutes render him liable for these taxes. Petitioner's legal arguments are without merit and lack factual and legal foundation.[3] His arguments have been repeatedly rejected by this and other courts. See, e.g., Garber v. Commissioner, T.C. Memo. 2012-47, aff'd, __ Fed. Appx. __, 2013 WL 563289 (7th Cir. 2013); Brennan v. Commissioner, T.C. Memo. 2009-77; Fox v. Commissioner, T.C. Memo. 1991-240, aff'd, 969 F.2d 951 (10th Cir. 1992). "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." Crain v. Commissioner, 737 F.2d 1417, 1417 (5th Cir. 1984); see also Casper v. Commissioner, 805 F.2d 902 (10th Cir. 1986), aff'g T.C. Memo. 1985-154.

With respect to respondent's deficiency determinations, petitioner has alleged no justiciable error in his petition or in his opposition to respondent's motion for summary judgment and has failed to aver facts tending to show error in respondent's bases for the deficiencies. Accordingly, respondent is entitled to summary judgment with respect to the deficiencies for each year at issue. See Swain v. Commissioner, 118 T.C. 358, 362 (2002).

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[3]Viewed charitably, certain of petitioner's assignments of error, regarding whether he is properly characterized as an "employee" having an "employer", might be construed as attempting to call into question whether certain of petitioner's receipts should be characterized as independent contractor fees rather than as wages of an employee. Such characterization, however, would not affect the inclusion of such amounts in petitioner's taxable income. See Alexander v. Commissioner, T.C. Memo. 2012-75.

Petitioner has also failed to assign error with respect to respondent's determination of additions to tax pursuant to sections 6651(a)(2) and 6654 or to aver facts tending to show error in respect of respondent's bases for these determinations. We deem petitioner to have conceded these additions to tax. See Rule 34(b)(4). Consequently, respondent has no burden of production with respect to these additions to tax. See Swain v. Commissioner, 118 T.C. at 362-365; see also Wheeler v. Commissioner, 127 T.C. 200, 206 (2006) ("Commissioner's obligation under section 7491(c) initially to come forward with evidence that it is appropriate to apply a particular penalty to a taxpayer is conditioned upon the taxpayer's assigning error to the Commissioner's penalty determination."), aff'd, 521 F.3d 1289 (10th Cir. 2008).

Petitioner has also failed to assign error with respect to respondent's determination of the section 6651(f) penalty for fraudulent failure to file or to aver facts tending to show error in respect of respondent's bases for this determination. We deem petitioner to have conceded these penalties. See Rule 34(b)(4). Consequently, respondent had no obligation to present evidence that petitioner is liable for this penalty. See Swain v. Commissioner, supra; Gordon v. Commissioner, 73 T.C. 736, 739 (1980). Respondent contends, however, that he has nevertheless submitted evidence, in the form of deemed admissions under Rule 37, to establish by clear and convincing evidence that petitioner fraudulently failed to file returns for the years at issue. We agree.

Petitioner was convicted under section 7203 for willfully failing to file returns for his 2003, 2004, and 2005 tax years. Although this conviction does not establish the fraudulent intent required under section 6651(f), it is evidence of fraud that coupled with other badges of fraud, discussed below, warrants imposition of the penalty for fraud. See Owens v. Commissioner, T.C. Memo. 2001-314; Groves v. Commissioner, T.C. Memo. 1999-415; Wilkinson v. Commissioner, T.C. Memo. 1997-410.

Over a long period, including the years at issue, petitioner received substantial amounts of unreported income. This is a badge of fraud. See Bradford v. Commissioner, 796 F.2d 303, 308 (9th Cir. 1986), aff'g T.C. Memo. 1984-601. He filed Federal income tax returns, however, only for his 1998, 1999, and 2000 tax years, which is also a badge of fraud. See Marsellus v. Commissioner, 544 F.2d 883, 885 (5th Cir. 1977), aff'g T.C. Memo. 1975-368; Castillo v. Commissioner, 84 T.C. 405, 409 (1985); Temple v. Commissioner, T.C. Memo. 2000-337, aff'd, 62 Fed. Appx. 605 (6th Cir. 2003); Wheadon v. Commissioner, T.C. Memo. 1992-633. At all times relevant to this case, petitioner was well aware

of his receipt of gross income amounts far in excess of the amounts which require the filing of a Federal income tax return. Despite his awareness of both his tax filing obligations and his receipt of substantial amounts of gross income, petitioner relied upon legal theories well established as having no legal merit as a basis for intentionally failing to file his 2003 through 2005 Federal income tax returns.

Petitioner has a long history of asserting arguments that have long been discredited as frivolous, irrelevant, and otherwise lacking in merit. Such arguments, coupled with affirmative acts designed to evade Federal income tax, support a finding of fraud. See Mooney v. Commissioner, T.C. Memo. 2011-35; Chase v. Commissioner, T.C. Memo. 2004-142; Houser v. Commissioner, T.C. Memo. 2000-111. Petitioner's 2005 lawsuit challenging the Federal taxing system coupled with his non arms-length transfers of real estate are also indicia of fraud. See Richardson v. Commissioner, 509 F.3d 736 (6th Cir. 2007), aff'g T.C. Memo. 2006-69; Webster v. Commissioner, T.C. Memo. 1992-220, aff'd without published opinion, 4 F.3d 995 (6th Cir. 1993). Petitioner's history of filing returns before 1996, and his filing of returns for his 1998, 1999, and 2000 tax years, before ceasing to file returns completely after 2000, leads us to believe that his decision to stop filing returns was based on frivolous legal positions rather than a good-faith belief that he was not required to file returns. See Niedringhaus v. Commissioner, 99 T.C. 202, 211 (1992).

These facts, which petitioner is not entitled to dispute, establish that petitioner is liable for the penalty under section 6651(f). See Marshall v. Commissioner, 85 T.C. 267, 272-273 (1985); Doncaster v. Commissioner, 77 T.C. 334, 336-338 (1981) (deemed admissions can be used to prove fraud); Vogt v. Commissioner, T.C. Memo. 2007-209, aff'd, 336 Fed. Appx. 758 (9th Cir. 2009).

We conclude that there are no genuine disputes of material fact requiring a trial and that respondent is entitled to summary judgment as a matter of law.

Section 6673 Penalty

Section 6673 authorizes this Court to require a taxpayer to pay to the United States a penalty not in excess of $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceeding is frivolous or groundless.

Respondent has not moved for the imposition of a penalty under section 6673 against petitioner, and we do not impose such a penalty against him today.

Petitioner is strongly warned, however, that if he should advance frivolous or groundless arguments to this Court in the future the Court may impose a penalty of up to $25,000.

The premises considered, it is

ORDERED: That respondent's motion for summary judgment, filed March 4, 2013, is granted. It is further

ORDERED AND DECIDED: That there are deficiencies, penalties, and additions to tax due from petitioner as follows:

		Penalties/Additions to Tax		
Year	Deficiency	Sec. 6651(f)	Sec. 6651(a)(2)	Sec. 6654
2003	$127,049.00	$92,106.90	$31,761.00	$3,277.88
2004	125,512.00	90,994.75	31,377.50	3,596.76
2005	131,444.00	95,296.90	32,861.00	5,272.41

(Signed) Michael B. Thornton
Judge

ENTERED: **APR 23 2013**